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Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

IN RE GRAND JURY SUBPOENAS ON
BERNARD M. BARRETT, JR., M.D., ET AL

BERNARD M. BARRETT, JR., M.D.,
Petitioner

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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50 pp

I

QUESTION PRESENTED

Do the conflicts of interest of a prosecutorial team before a grand jury and the improper purpose of the grand jury process require a preindictment remedy?

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1. The parties to this proceeding are Bernard M. Barrett, Jr., M.D., and the United States.

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**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 19, 1987, and its judgment denying rehearing entered on June 29, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 818 F.2d 330, appears in the appendix, page A-1. The judgment of the Court of Appeals denying rehearing appears in the appendix, page A-7. The judgment of the United States District Court for the Southern District of Texas appears in the record at appendix, page A-8.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was rendered and entered on May 19, 1987. The judgment denying rehearing was rendered and entered on June 29, 1987. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V. See appendix A-9.

Internal Revenue Code of 1954, as amended, sections:

26 U.S.C. Section 6103	See Appendix A-10
26 U.S.C. Section 6531	See Appendix A-16
26 U.S.C. Section 7213	See Appendix A-19
26 U.S.C. Section 7431	See Appendix A-22
28 U.S.C. Section 1291	See Appendix A-25

Federal Rules of Criminal Procedure, Rule 6(e). See Appendix A-26.

STATEMENT OF THE CASE

Dr. Barrett was the subject of an administrative civil and criminal investigation by the Internal Revenue Service involving his individual tax returns for 1976 through 1980 and his professional association's tax returns for the fiscal years ending March 31, 1979 and March 31, 1980. The administrative civil investigation began on July 20, 1979. In March of 1981, an administrative criminal investigation of Dr. Barrett began and Internal Revenue Service Special Agent Michael O. Hanson became the agent in charge of that investigation.

In March of 1983, Special Agent Hanson wrote to approximately 400 of Dr. Barrett's patients advising them that Dr. Barrett was under criminal investigation. Dr. Barrett filed a civil damage action under Internal Revenue Code (I.R.C.) § 7431, claiming principally that Special Agent Hanson improperly disclosed confidential return information to Dr. Barrett's patients in violation of I.R.C. § 6103. Dr. Barrett filed the civil damage action during the administrative criminal investigation, in November of 1983. The civil division Assistant United States Attorney who was responsible for defending the government and Special Agent Hanson's actions in the civil damage lawsuit was Nancy K. Pecht. She labeled herself as "attorney in charge" for the government in such lawsuit. The civil damage action and Special Agent Hanson's role therein are discussed fully in *Barrett v. United States,* 795 F.2d 446 (5th Cir. 1986). In that case, the Fifth Circuit remanded Dr. Barrett's claims for trial and the action is pending in the district court.

In 1986, a grand jury investigation of Dr. Barrett was initiated in the Southern District of Texas. The prosecutor

before the grand jury is Assistant United States Attorney (AUSA) Nancy K. Pecht who transferred to the criminal division during the time she was acting as the "attorney in charge" of defending the government and Special Agent Hanson's actions in Dr. Barrett's civil damage action under I.R.C. § 7431. Special Agent Hanson was appointed as the prosecutor's assistant under Federal Rule of Criminal Procedure 6(e)(3)(A)(ii).

On August 14, 1986, Dr. Barrett moved the district court supervising the grand jury to quash grand jury subpoenas, for protective orders, and for a temporary restraining order and filed a complaint for injunctive relief to prevent asserted abuse of the grand jury process. Dr. Barrett claimed that the grand jury investigation was initiated to shield Special Agent Hanson from loss of his job and potential criminal prosecution under I.R.C. § 7213 and to attempt to gain an advantage for the government in defense of the civil damage action under I.R.C. § 7431. Dr. Barrett asserted that AUSA Pecht's prior responsibility for defending the government in the civil damage suit and Special Agent Hanson's exposure under I.R.C. § 7213 for loss of employment and criminal liability stemming from the civil damage action were the basis for serious conflicts of interest on their part as the prosecutorial team before the grand jury.

In defending the action to terminate the grand jury proceeding, AUSA Pecht informed the district court that the grand jury investigation was "totally separate" from the prior administrative investigation because it covered different tax years. It is significant that the tax years that are the subject of the grand jury investigation are 1981 through 1986 and have never been administratively reviewed by the I.R.S. It is very suspect that

Agent Hanson and AUSA Pecht form the prosecutorial team before the grand jury for an allegedly "totally separate" investigation into administratively unreviewed tax return years, while the only matter surviving the administrative investigation into the prior tax years is Dr. Barrett's civil damage action under I.R.C. § 7431. There was never any indictment, charge or deficiency asserted for the prior years. Additionally, the criminal statute of limitations under I.R.C. § 6531 has now barred prosecution for all of the administratively investigated tax years.

A significant example of improper conduct as the prosecutor's assistant before the grand jury is Special Agent Hanson's unauthorized and illegal alteration of a grand jury subpoena at the time he served it on Dr. Barrett's bank. Agent Hanson hand wrote on the subpoena that the bank did not need to produce copies of microfilmed patient checks that had been deposited into Dr. Barrett's bank accounts. This was the same exculpatory evidence (for 1976 through 1980) the Fifth Circuit in *Barrett v. U. S.*, 795 F.2d 446, stated should have been examined prior to Agent Hanson's mailing of approximately 400 letters to Dr. Barrett's patients unnecessarily disclosing that he was the target of an I.R.S. criminal investigation. Special Agent Hanson's alteration of the grand jury subpoena was an affirmative attempt to exclude exculpatory evidence from the grand jury.

Another significant example of Special Agent Hanson's improper conduct and conflict of interest as a prosecutor's assistant before the grand jury occurred when he was allowed to schedule the deposition of a government noticed witness named Joan Woodruff in the civil damage action. At Ms. Woodruff's deposition she testified that Special Agent Hanson informed her that

her deposition was to be taken in Cincinnati, Ohio, rather than Houston, out of concern for her personal safety. The truth was that counsel for both parties agreed to Ms. Woodruff's deposition in Cincinnati because she could not be subpoenaed to Houston. Ms. Woodruff also testified at her deposition that Special Agent Hanson informed her "there were criminal actions" pending against Dr. Barrett. Such a statement by a prosecutor's assistant is a clear and serious violation of Rule 6(e). Special Agent Hanson's comments to Ms. Woodruff manifest his conflict of interest because they clearly constitute improper attempts to influence Ms. Woodruff against Dr. Barrett in his civil damage action.

Compelling evidence of the government's improper motive in initiating the allegedly "totally separate" grand jury investigation is found in the following statement contained in the government's memorandum of law in support of its motion to stay Dr. Barrett's civil damage action pending the grand jury investigation:

> A resolution of the criminal proceeding, on the other hand, could make the civil suit moot. If Barrett is convicted, query the damages.

The above statement is factually significant to this case because it is legally incorrect and represents a malicious attempt to use the allegedly "totally separate" grand jury investigation to gain an advantage for the government in defending Dr. Barrett's civil damage action. The statement is legally incorrect under the plain terms of I.R.C. § 7431, which is especially intended to protect taxpayers who are being investigated, provides for minimum statutory damages, and does not contain any exception for taxpayers who may be convicted as the

result of any grand jury proceeding. Dr. Barrett also alleged and contends here that the initiation and leading of the allegedly "totally separate" grand jury investigation by Special Agent Hanson and AUSA Nancy K. Pecht constitute conduct calculated to deprive Dr. Barrett of his statutory rights under 26 U.S.C. §§ 6103 and 7431 and his constitutional due process rights to an impartial and unbiased grand jury.

The government filed a response in the district court in this matter on August 27, 1986, with an affidavit by AUSA Pecht. On August 29, 1986, the district court held a conference in chambers and immediately entered an order, without granting an evidentiary hearing, denying all relief sought by Dr. Barrett and refusing to stay the district court's order pending appeal. The Fifth Circuit denied Dr. Barrett's motion for stay on September 2, 1986. On that date, Dr. Barrett appeared before the grand jury as subpoenaed, produced the records he was subpoenaed to produce, and fully answered all questions asked of him. To date, there has been no indictment returned against Dr. Barrett.

The Fifth Circuit held that the district court's refusal to allow any evidentiary hearing or grant any of the requested relief was not final under 28 U.S.C. § 1291 and that appellate review of his claims could be obtained only by a motion to quash any subsequent indictment. The Fifth Circuit's opinion does not address the possibility that the grand jury will not indict with the result that Dr. Barrett will never have the later opportunity for appellate review. The Fifth Circuit's opinion further fails to address Dr. Barrett's due process right to a fair and impartial grand jury whether or not there is a subsequent indictment.

REASONS FOR GRANTING THE WRIT

I. A prosecutorial team with multiple conflicts of interest renders the grand jury proceedings invalid and constitutes a gross violation of the due process right to a fair and impartial grand jury proceeding.

Section 7213 of the Internal Revenue Code provides for loss of employment and felony criminal prosecution of government employees who disclose "return information" in violation of § 6103. Special Agent Hanson's actions in mailing approximately 400 letters to Dr. Barrett's patients disclosing the "return information" that he was the target of a criminal investigation and the Fifth Circuit's prior decision remanding Dr. Barrett's now pending civil damage action for trial in *Barrett v. United States,* 795 F.2d 446, create substantial exposure for Special Agent Hanson for loss of employment and criminal prosecution under § 7213. In two related summons enforcement cases involving Dr. Barrett and the prior administrative investigation, the Fifth Circuit expressly acknowledged the potential application of § 7213 to Special Agent Hanson's actions. *See United States v. Barrett,* 787 F.2d 958, 960 (5th Cir.), *withdrawn and new opinion substituted,* 804 F.2d 1376, 1378 (1986), *reh'g en banc granted,* 812 F.2d 936 (1987); *United States v. Texas Heart Institute,* 755 F.2d 469, 482 (5th Cir. 1985). Given such exposure under § 7213 it is highly improper for Special Agent Hanson to act as a member of the prosecutorial team in an allegedly "totally separate" grand jury investigation of administratively unreviewed subsequent tax return years.

Additionally, AUSA Nancy K. Pecht's transfer to the criminal division, while defending the government in Dr. Barrett's civil damage action, to lead the allegedly "totally separate" grand jury investigation with the assistance of Special Agent Hanson constitutes a clear conflict of interest under which AUSA Pecht is laboring. There is the further conflict of interest regarding the obligation of the U.S. Attorney's office to consider prosecution of Special Agent Hanson under § 7213 rather than use him as a prosecutor's assistant in the allegedly "totally separate" grand jury investigation of Dr. Barrett.

The fact that these serious and multiple conflicts of interest held by the prosecutorial team have caused an improper use of the grand jury process in this case is clearly demonstrated by the government's continuing attempts to stay Dr. Barrett's civil damage action pending the grand jury investigation. The government maliciously and incorrectly argued that if Dr. Barrett is indicted and convicted as a result of the allegedly "totally separate" grand jury investigation, it will moot his civil damage action because he will not then be entitled to any damages for the illegal disclosures made by Special Agent Hanson in the prior administrative investigation. Section 7431 was intended to protect taxpayers who are under investigation, provides for minimum statutory damages regardless of proof of actual damages, and contains no provision restricting its application in the event a plaintiff-taxpayer is subsequently convicted.

The very nature of a conflict of interest is that it causes improper purposes and motives and that is why the grand jury process cannot tolerate even the slightest conflict of interest. The integrity of the grand jury process must

be maintained to preserve the purposes of the grand jury "to provide a fair method for instituting criminal proceedings", to serve "as a protector of citizens against arbitrary and oppressive governmental action" and to assure the "protecting of citizens against unfounded criminal prosecutions." *United States v. Gold,* 470 F. Supp. 1336, 1345-46 (N.D. Ill. 1979).

The prosecutorial team that labors under conflicts of interest cannot administer justice. The members of the prosecutorial team with conflicts of interest are unauthorized persons before the grand jury and their intrusion into the grand jury room voids and invalidates any resulting indictment, even without a showing of prejudice. *Latham v. United States,* 226 F. 420, 424 (5th Cir. 1915); *United States v. Gold,* 470 F. Supp. at 1346; *United States v. Phillips Petroleum Co.,* 435 F. Supp. 610, 618 (N.D. Okla. 1977); *State v. Hill,* 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975).

Furthermore, the target of a grand jury investigation led by a prosecutorial team with multiple conflicts of interest is denied the due process right to a fair and unbiased grand jury. Implicit in the Fifth Amendment prohibition that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." is the guarantee that a grand jury will be fair and unbiased. *United States v. Gold,* 470 F. Supp. at 1395. "The grand jury's ability to safeguard accused persons against felony charges which it believes unfounded is an attribute of due process of law inherent in the grand jury proceeding . . . it is a 'constitutional right' . . . and the courts should not hesitate to vindicate the demands of due process." *United States*

v. Phillips Petroleum Co., 435 F. Supp. at 621. In *Stirone v. United States*, 361 U.S. 212, 218 (1960), this Court stated that "the very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

Under the facts and circumstances of this case, it is clear that Dr. Barrett is being denied his due process right to a grand jury proceeding led by prosecutors without conflicts of interest and that the grand jury process is being seriously abused. It was clear error for the district court to deny all requested relief without any evidentiary hearing and it was clear error for the Fifth Circuit to hold that this case was not appealable.

II. The Fifth Circuit's decision conflicts with this Court's decisions in *United States v. Sells Engineering, Inc.* and *Cohen v. Beneficial Industrial Loan Corp.*

This Court recognized in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1982) that:

> If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, *or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely*. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*.

Id. at 432 (emphasis added). That case involved access by non-prosecuting government attorneys to grand jury information. In the case at hand, the prosecuting attorney leading the grand jury investigation is the same attorney who formerly conducted the defense of Dr. Barrett's civil damage action. This situation obviously lends itself to a greater likelihood of improper purpose than the *Sells Engineering* case which involved different attorneys in each function. Especially when Special Agent Hanson is allowed to become a member of the prosecutorial team at a time when his actions are the subject of the civil damage action and he has exposure under § 7213 for loss of employment and criminal prosecution, the integrity of the grand jury process is necessarily sacrified.

In the analogous case of *United States v. Gold,* 470 F. Supp. 1336 (N.D. Ill. 1979), a civil attorney became a prosecutor before a grand jury. That attorney was found to be a person unauthorized to be in the grand jury room as a lawyer who labored under a conflict of interest. *Id.* at 1351. The multiple conflicts of interest of the prosecutorial team in this case demonstrate that substantial rights of Dr. Barrett are being forever destroyed and the subject grand jury investigation is improper *per se.*

The most compelling evidence of the government's improper motive in initiating and continuing the grand jury investigation was the statement in the government's memorandum of law in support of its motion to stay the civil damage action that:

> A resolution of the criminal proceeding, on the other hand, could make the civil suit moot. If Barrett is convicted, query the damages.

That statement is a clear and compelling manifestation of the government's improper motive in conducting the grand jury proceeding. Under *United States v. Sells Engineering, supra,* the grand jury investigation of Dr. Barrett is improper *per se.*

The Fifth Circuit incorrectly stated in its opinion that "Barrett, however, challenges the validity of the grand jury investigation, and he can show no specific irregularities such as unauthorized disclosures of grand jury materials." Dr. Barrett made a clear showing of the impropriety *per se* of the grand jury. The use of the grand jury to justify a stay of the civil damage action and as an instrument to eviscerate Dr. Barrett's claim for civil damages via an indictment and conviction are more than specific irregularities. They go to the very heart of the improper motive for initiating and continuing a grand jury investigation.

The improper nature and use of the grand jury investigation in this case does irreparably harm Dr. Barrett and requires immediate appellate review. Dr. Barrett's civil damage claim under I.R.C. §§ 6103 and 7431 is being frustrated by the improper use of the grand jury process as a government defense tool. The government's assertion that a conviction of Dr. Barrett would eliminate his damages in the civil action evidences an abuse of the grand jury process to defend the civil damage action. Misuse of the grand jury process to defeat the civil damage action or gain some advantage therein cannot be corrected after it has occurred, whether or not there is a subsequent indictment. The Fifth Circuit improperly failed to apply to this case the appropriate reasoning it utilized in *In re*

Grand Jury Investigation, 610 F.2d 202 (5th Cir. 1980). There, the Court found that:

> The harm Lance alleges is capable of repetition, and if we were to require completion of the discrete criminal trial processes before permitting review, we would deny any efficacious remedy . . . Unless we provide a remedy now, the harm would be rendered unreviewable.

Id. at 212-13. Lance complained primarily of grand jury disclosures and the resultant harm. In the instant case, Dr. Barrett's civil suit seeks damages for his constitutional and statutory rights to privacy which are explicitly protected by I.R.C. §§ 6103 and 7431. It is the government's ongoing improper use of the grand jury to defend against Dr. Barrett's claims which demands the remedy of review at this time.

The erroneousness of the Fifth Circuit's reasoning is plain in its holding that Dr. Barrett may obtain appellate review of his claims herein after the conclusion of the grand jury investigation. Clearly, if the grand jury does not indict Dr. Barrett, he will have no forum for review of these claims. He will have his rights under I.R.C. §§ 6103 and 7431 irrevocably diminished by governmental abuse of the grand jury. Should the grand jury indict, he can perhaps obtain a review of the grand jury improprieties. However, he will have endured the investigation by a grand jury convened for an improper purpose and led by a prosecutorial team with multiple conflicts of interest. His civil damage action will have been unlawfully impeded by the government's defensive use of the grand jury. Dr. Barrett's right to the due process protec-

tion provided by a fair and impartial grand jury investigation would be irrevocably and improperly sacrificed.

This Court has stated that one of the purposes of a grand jury is to serve "as a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra,* 414 U.S. 388, 389 (1974). Dr. Barrett has made a clear showing that the grand jury investigation of him is based on arbitrary and oppressive governmental action and it should therefore be subject to immediate review.

Unless Dr. Barrett is granted a remedy now, the harms he will suffer as a result of the improper *per se* grand jury will be irreparable. There is no action now or in the future, other than the present action, which can redress the injuries Dr. Barrett is suffering pursuant to this grand jury investigation. The continuation and publication of such an improper grand jury proceeding will necessarily cause substantial harm to Dr. Barrett's professional and personal reputation. It damages his ability to earn a living. The failure of the courts to grant Dr. Barrett relief now will foreclose his ability to later obtain an effective remedy. The injuries that Dr. Barrett complains of herein are separable from, and collateral to, the rights asserted by Dr. Barrett in his civil damage action. These injuries are also separable from, and collateral to, any criminal case which may result from the grand jury investigation. They are fundamental grounds for terminating the illegal and improper grand jury investigation. In every way, the rights that Dr. Barrett asserts in this case are too important to be denied review and too independent to defer appellate consideration. The rights asserted by Dr. Barrett herein are strictly within the category of claims recog-

nized by this Court in the case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 549 (1949). This Court deemed such claims to be subject to appellate review independent of adjudication of all other related matters. The Fifth Circuit was incorrect in its determination that the instant case is not appropriate for appellate review at this time.

This Court and others have many times held that where important constitutional rights would be defeated, immediate appellate review is appropriate. *Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy right lost if no appellate jurisdiction); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (order denying Speech and Debate Clause defense to prosecution immediately appealable); *In Re Matter of Grand Jury Subpoena Duces Tecum, Appeal of Anonymous Corp.*, 725 F.2d 1110 (7th Cir. 1984) (appellate jurisdiction established with issue of grand jury irregularity over whether there was in actuality a grand jury investigation). Under the circumstances of the grand jury irregularity involved in this case, Dr. Barrett has sufficiently demonstrated a due process interest that will be forever destroyed unless appellate review is allowed. The due process right to a fair and unbiased grand jury proceeding without a prosecutorial team laboring under conflicts of interest is clearly deserving of appellate court consideration and at least a full evidentiary hearing in the district court. The district court's judgment was reviewable as a final judgment under the rationale of *In the Matter of the Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978) and *In Re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980) or as a collateral order under the *Cohen* doctrine.

III. It is of great public importance that this Court not allow the privacy and confidentiality rights of taxpayers to be eviscerated by condoning the governmental strategy of using the grand jury process to defeat such rights.

By enacting I.R.C. §§ 6103, 7431 and 7213 Congress clearly directed the government to scrupulously observe the privacy and confidentiality rights of taxpayers that it investigates. If taxpayers, such as Dr. Barrett, seek to enforce their rights under I.R.C. §§ 6103, 7431 and 7213 and are subjected to an allegedly "totally separate" grand jury investigation of all their subsequent tax return years without any prior administrative review, it will certainly chill the desire and ability of taxpayers to seek judicial enforcement of their confidentiality rights and will defeat the congressional purpose in enacting such confidentiality statutes. Dr. Barrett contends and has demonstrated in the courts below that such an improper strategy is exactly what is being utilized in this case. The denial of an evidentiary hearing and an appellate review of this strategy and the resultant precedent will potentially subject all taxpayers to such an improper strategy. This Court should grant a writ of certiorari herein to review this matter in detail to insure that the purposes of the confidentiality statutes of the Internal Revenue Code are not administratively erased by the deployment of such an improper strategy.

CONCLUSION

This Court should grant certiorari to review the Fifth Circuit's opinion in this case.

Respectfully submitted,

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APPENDIX

In re GRAND JURY SUBPOENAS ON
Bernard M. BARRETT, Jr., M.D., et al.,
Petitioners-Appellants.

No. 86-2681.

United States Court of Appeals,
Fifth Circuit.

May 19, 1987.

Subject of grand jury investigation filed action to quash certain grand jury subpoenas, to obtain protective order barring further subpoenas, and to terminate that investigation. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., denied all requested relief, and subject appealed. The Court of Appeals, Thornberry, Circuit Judge, held that district court's refusal to terminate investigation was not final and appealable because subject could obtain appellate review of his claims after investigation was finished.

Appeal dismissed.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, GEE, and JONES, Circuit Judges.

THORNBERRY, Circuit Judge:

A federal grand jury is currently investigating Dr. Bernard M. Barrett, Jr. to determine whether he violated

the criminal provisions of the Internal Revenue Code. Before the grand jury investigation began, Special Agent Michael O. Hanson had conducted an administrative investigation of Barrett for the Internal Revenue Service ("IRS"). After the IRS referred the case to the Department of Justice, which authorized a grand jury investigation, Agent Hanson was designated to assist Assistant U.S. Attorney Nancy Pecht in conducting the grand jury investigation. According to the government, the IRS and the Department of Justice usually assign the IRS special agent who conducted the administrative criminal investigation within the IRS to assist the government attorney conducting the grand jury investigation.

Before transferring to the Criminal Division of the U.S. Attorney's office in February 1986, Pecht served in the Civil Division of that office. During her tenure in the Civil Division, Pecht represented the government in a proceeding to enforce an IRS summons issued by Hanson to obtain the records of Barrett's professional corporation. *See United States v. Barrett,* 787 F.2d 958 (5th Cir.), *withdrawn and new opinion substituted,* 804 F.2d 1376 (1986), *reh'g en banc granted,* 812 F.2d 936 (1987). She also worked on another summons enforcement action to obtain records relating to Barrett from four hospitals, *see United States v. Texas Heart Institute,* 755 F.2d 469 (5th Cir. 1985), and served as local counsel for Department of Justice Tax Division attorneys in Barrett's damage suit against the United States. In that suit, Barrett alleged that Hanson had improperly disclosed the criminal investigation of Barrett in violation of 26 U.S.C. § 6103. *See Barrett v. United States,* 795 F.2d 446 (5th Cir. 1986).

Barrett filed the present action to quash certain grand jury subpoenas, obtain a protective order barring further subpoenas, and terminate the grand jury investigation. Barrett alleged that Pecht and Hanson were misusing the grand jury to gain an advantage in defending the damage action and that they both had a conflict of interest that disqualified them from participating in the grand jury investigation. Following a hearing, the district court refused to impede the grand jury in any way.

Barrett does not specify how the government has used the grand jury investigation to aid its defense of Barrett's civil suit. For example, Barrett alleges no unauthorized disclosure of grand jury material to the attorneys defending the government in the civil action. Barrett attacks the *validity* of the grand jury, not specific irregularities (*e.g.*, illegal disclosures of secret information) that injure him independently of the investigation itself. Barrett admits that in general the government may investigate him through the grand jury. His sole argument, therefore, is that Pecht and Hanson improperly instituted this grand jury and that they have a conflict of interest.

Barrett's initial pleading combined a motion to quash four grand jury subpoenas, a motion for a protective order, a motion for a temporary restraining order, and a complaint seeking an injunction to prevent further grand jury investigation of him. Barrett appeals only the denial of injunctive relief. On August 29, 1986, the district court entered an order that stated, "Motion to Quash Grand Jury Subpoenas Denied." That order contains no reference to Barrett's other motions. After reading the transcript of the hearing on Barrett's motions, however, we conclude that the district court denied all the relief

that Barrett requested, including the request for an injunction.

The government argues that Barrett may not appeal the district court's refusal to terminate the grand jury. In *In re Grand Jury Investigation,* Bert Lance complained that government lawyers violated the secrecy provisions of Rule 6(e). 610 F.2d 202 (5th Cir. 1980). The Fifth Circuit held that Lance could appeal the district court's denial of his motion for sanctions (including dismissal of the grand jury and sanctions against Department of Justice lawyers). According to the court,

> The harm Lance alleges is capable of repetition, and if we were to require completion of the discrete criminal trial processes before permitting review, we would deny any efficacious remedy. Acquittal or conviction would so obscure the claim of a personal remedy for grand jury irregularity as to render it meaningless. Lance's request for relief has practical viability only while the resultant criminal proceeding is executory. Unless we provide a remedy now, the harm would be rendered unreviewable. The situation is thus analogous to an interlocutory civil order which the *Cohen* doctrine would make appealable. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949).

Id. at 212-13. The court did not address Lance's request to dismiss the grand jury, because, "The return of the indictment . . . moot[s] Lance's request that the grand jury be dismissed. To attack the validity of the grand jury proceedings, he must now seek to dismiss the indictment." *Id.* at 213.

In re Grand Jury Investigation expressly adopted the reasoning of *In re Special April 1977 Grand Jury,* 587

F.2d 889 (7th Cir. 1978). In that case, William J. Scott, the Attorney General of Illinois, sought to prevent illegal disclosures of grand jury material. Stressing the fact that Scott would have no meaningful review unless allowed to appeal immediately, the Seventh Circuit held that the district court's order was final under 28 U.S.C. § 1291. The court, however, distinguished another Seventh Circuit case that had reached the opposite conclusion on jurisdiction.

> [T]he [*In re Special March 1974 Grand Jury*] Court applied the exceptional circumstances doctrine and held the order nonappealable because the corporation
>
> > failed to demonstrate how a denial of review will leave it powerless eventually to correct an injustice on a plenary review after the grand jury has ceased its investigation and the criminal trial has been conducted.

In re Special April 1977 Grand Jury, 587 F.2d at 891 (quoting *In re Special March 1974 Grand Jury,* 541 F.2d 166 (7th Cir. 1976)).

Both the Fifth Circuit in *In re Grand Jury Investigation* and the Seventh Circuit in *In re Special April 1977 Grand Jury* stressed that the claims of unauthorized disclosure would be effectively unreviewable after trial. In those cases, the subject of the investigation alleged harm that was independent from the grand jury investigation itself. Barrett, however, challenges the validity of the grand jury investigation, and he can show no specific irregularities such as unauthorized disclosures of grand jury materials. Barrett may attack the validity of the grand jury by moving to quash any subsequent indictment. Therefore,

the reasoning of both *In re Grand Jury Investigation* and *In re Special April 1977 Grand Jury* argue against allowing Barrett's appeal.

To be appealable, Barrett's claim must fall "within 'the limited class of cases where denial of immediate review would render impossible any review whatsoever. . . .'" *In re Special April 1977 Grand Jury,* 587 F.2d at 891 (quoting *United States v. Ryan,* 402 U.S. 530, 91 S. Ct. 1580, 1582, 29 L.Ed.2d 85 (1971)). Other circuits have dismissed appeals from district court orders that rejected claims very similar to Barrett's. *See, e.g., In re Subpoenas to Local 478,* 708 F.2d 65, 70-71 (2d Cir. 1983) (union moved to terminate grand jury investigation because of government harassment); *In re April 1977 Grand Jury Subpoenas,* 584 F.2d 1366, 1368-70 (6th Cir. 1978) (motion to disqualify IRS lawyer from participation in grand jury investigation because he participated in civil audit). We hold that the district court's refusal to terminate the grand jury investigation is not final under 28 U.S.C. § 1291 because Barrett may obtain appellate review of his claims after the grand jury finishes its investigation.

DISMISSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2681

IN RE: GRAND JURY SUBPOENAS ON
BERNARD M. BARRETT, JR.,
M.D., ET AL.,
Petitioners-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion May 19, 5 Cir., 1987, ____F.2d____)

(June 29, 1987)

Before THORNBERRY, GEE and JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

CASE NO. H-86-326 (Misc.)

IN RE GRAND JURY SUBPOENAS
ON BARRETT, ET AL.

DATE OF CONFERENCE
8-29-86 at 3:00 PM

LAW CLERK AB

(Filed August 29, 1986)

ORDER following conference

(Ct. Rptr:

1. Motion to Quash Grand Jury Subpoenas DENIED.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

Date: August 29, 1986.

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTERNAL REVENUE CODE

The only subsections of I.R.C. § 6103 relevant to this Petition are 6103(a), 6103(b), and 6103(k), all set forth below:

Sec. 6103. *Confidentiality and Disclosure of Returns and Return Information.*

[Sec. 6103(a)]

(a) GENERAL RULE.—Returns and return information shall be confidential and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

[Sec. 6103(b)]

(b) DEFINITIONS.—For purposes of this section—

(1) RETURN.—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION.—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined

in section 6110(b)) which is not open to public inspection under section 6110.

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) TAXPAYER RETURN INFORMATION.—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) TAX ADMINISTRATION.—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or pro-

posed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) STATE.—The term "State" means—

(A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau, and

(B) for purposes of subsection (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality—

(i) with a population in excess of 2,000,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) TAXPAYER IDENTITY.—The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) INSPECTION.—The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) DISCLOSURE.—The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) FEDERAL AGENCY.—The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

(10) CHIEF EXECUTIVE OFFICER.—The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

[Sec. 6103(k)]

(k) DISCLOSURE OF CERTAIN RETURNS AND RETURN INFORMATION FOR TAX ADMINISTRATION PURPOSES.—

(1) DISCLOSURE OF ACCEPTED OFFERS-IN-COMPROMISE.—Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

(2) DISCLOSURE OF AMOUNT OF OUTSTANDING LIEN.—If a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to such lien or intends to obtain a right in such property.

(3) DISCLOSURE OF RETURN INFORMATION TO CORRECT MISSTATEMENTS OF FACT.—The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administra- purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.

(4) DISCLOSURE TO COMPETENT AUTHORITY UNDER TAX CONVENTION.—A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention or other convention relating to the exchange of tax information with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention.

(5) STATE AGENCIES REGULATING TAX RETURN PREPARERS.—Taxpayer identity information with respect to any income tax return preparer, and information as to whether or not any penalty has been assessed against such income tax return preparer under section 6694, 6695, or 7216, may be furnished to any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of income tax return preparers. Such information may be furnished only upon written request by the head of such agency, body, or commission designating the officers or employees to whom such information is to be fur-

nished. Information may be furnished and used under this paragraph only for purposes of the licensing, registration, or regulation of income tax return preparers.

(6) DISCLOSURE BY INTERNAL REVENUE OFFICERS AND EMPLOYEES FOR INVESTIGATIVE PURPOSES.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

[Sec. 6531]

Sec. 6531. *Periods of Limitation on Criminal Prosecutions.*

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency

thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, c nseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206 (1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212 (a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214 (a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object

of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title). Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

[Sec. 7213]

Sec. 7213. *Unauthorized Disclosure of Information.*

[Sec. 7213(a)]

(a) RETURNS AND RETURN INFORMATION.—

(1) FEDERAL EMPLOYEES AND OTHER PERSONS. —It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

(2) STATE AND OTHER EMPLOYEES.—It shall be unlawful for any person (not described in paragraph (1)) willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)) acquired by him or another person under subsection (d), (i)(3)(B)(i), (l)(6), (7), (8), (9), (10), or (11), or (m)(2) or (4) of section 6103. Any violation of this paragraph shall be a felony punishable by

a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(3) OTHER PERSONS.—It shall be unlawful for any person to whom any return or return information (as defined in section 6103(b)) is disclosed in any manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(4) SOLICITATION.—It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(5) SHAREHOLDERS.—It shall be unlawful for any person to whom a return or return information (as defined in section 6103(b)) is disclosed pursuant to the provisions of section 6103(e)(1)(D)(iii) willfully to disclose such return or return information in any manner not provided by law. Any violation of this paragraph shall be a felony punish-

able by a fine in any amount not to exceed $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

[Sec. 7213(b)]

(b) DISCLOSURE OF OPERATIONS OF MANUFACTURER OR PRODUCER.—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

[Sec. 7213(c)]

(c) DISCLOSURES BY CERTAIN DELEGATES OF SECRETARY.—All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

[Sec. 7213(d)]

(d) CROSS REFERENCES.—

(1) PENALTIES FOR DISCLOSURE OF INFORMATION BY PREPARERS OF RETURNS.—For penalty for disclosure or use of information by preparers of returns, see section 7216.

(2) PENALTIES FOR DISCLOSURE OF CONFIDENTIAL INFORMATION.—

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

[Sec. 7431]

Sec. 7431. *Civil Damages for Unauthorized Disclosure of Returns and Return Information.*

[Sec. 7431(a)]

(a) IN GENERAL.—

(1) DISCLOSURE BY EMPLOYEE OF UNITED STATES.—If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) DISCLOSURE BY A PERSON WHO IS NOT AN EMPLOYEE OF UNITED STATES.—If any person who

is not an officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against such person in a district court of the United States.

[Sec. 7431(b)]

(b) NO LIABILITY FOR GOOD FAITH BUT ERRONEOUS INTERPRETATION.—No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

[Sec. 7431(c)]

(c) DAMAGES.—In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) the greater of—

(A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of—

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

[Sec. 7431(d)]

(d) PERIOD FOR BRINGING ACTION.—Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

[Sec. 7431(e)]

(e) RETURN; RETURN INFORMATION.—For purposes of this section, the terms "return" and "return information" have the respective meanings given such terms in section 6103(b).

[Sec. 7431(f)]

(f) EXTENSION TO INFORMATION OBTAINED UNDER SECTION 3406.—For purposes of this section—

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.

For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.

28 U.S.C. Section 1291

§ 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

RULES OF CRIMINAL PROCEDURE

III. Indictment and Information

Rule 6. *The Grand Jury*

(e) *Recording and Disclosure of Proceeding.*

(1) *Recording of Proceedings.* All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) *General Rule of Secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury,

other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraphs (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indict-

ment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient

knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) *Sealed Indictments.* The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) *Closed Hearing.* Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) *Sealed Records.* Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.